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In the Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-1055, 73-1069, 73-1070, 73-1071, 73-1072

BOWMAN TRANSPORTATION, INC.; JOHNSON MOTOR LINES, INC.; RED BALL MOTOR FREIGHT, INC.; LORCH-WESTWAY CORPORATION, et al.; UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellants,

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

APPELLEES' MOTION TO DISMISS AND AFFIRM

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APPELLEES' MOTION TO DISMISS AND AFFIRM

Appellees[1] in the above-entitled cases move to dismiss Case No. 73-1069 (Johnson Motor Lines, Inc., appellant) on the ground that the appeal has not been taken in time and to affirm all such cases on the ground that the questions presented are so unsubstantial as not to need further argument.

1. Arkansas-Best Freight System, Inc., Mercury Motors, Incorporated, Alamo Express, Inc., Braswell Motor Freight Line, Inc., Campbell Sixty-Six Express, Inc., Central Freight Lines, Inc., ET&WNC Transportation Company, Eagle Motor Lines, Inc., Gordons Transports, Inc., Holloway Motor Express, Inc., Mercury Freight Lines, Inc., Red Arrow Freight Lines, Inc., Red Line Transfer & Storage Company, Inc., T.I.M.E.-DC, Inc., Transcon Lines, Yellow Freight System, Inc., Roadway Express, Inc. and Jack Cole-Dixie Highway Company.

QUESTIONS PRESENTED

(1) Whether the appeal in Case No. 73-1069 (Johnson) should be dismissed for lack of jurisdiction because it is based upon a notice of appeal that was filed while a motion to amend the judgment was pending before the lower court.

Many of the questions presented by certain appellants involve frivolous criticisms of the District Court's conduct. The remaining issues, which likewise do not present substantial questions for review, are restated as follows:

(2) Upon finding orders of the Interstate Commerce Commission, entered after a formal hearing, to be based upon findings and conclusions that were arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, did the District Court, expressly following a provision of the Administrative Procedure Act, 5 U.S.C. § 706, err by holding such orders to be unlawful?

(3) Was it mandatory that the District Court remand this case to the Commission for further proceedings on the present record; or, if not mandatory, did the court properly decline to remand under the peculiar circumstances and development of the agency record?[2]

STATEMENT OF THE CASE

This case involves a decision of the Interstate Commerce Commission disposing of applications by the three motor carrier appellants (Johnson, Red Ball and Bowman) that were before the Commission for more than seven

2. The only remand question raised in the court below, and therefore the only one properly before this Court, is whether remand was mandatory.

years. During this period, a massive expansion of carrier operations took place, with Commission approval.[3] Initially, there were 21 applications that sought major expansions of operating authority within the southeastern and southwestern portions of the United States. Ten, including the three here involved, were selected for hearing on a consolidated record before two of the Commission's most experienced hearing examiners (App. J 748).[4]

The Jurisdictional Statements outline the dates involved and the massive size of the record resulting from the consolidation of the ten applications. The examiners accurately summarized the voluminous evidence,[5] finding that there was no public need for the services proposed and that approval of any of the applications would result in a serious deterioration of existing service, contrary to the public interest. Their conclusions were predicated, in part, upon the fact that *none of the applicants proposed to supply service to any point or operate over any route that was not already adequately served by multiple carriers*. Instead, each proposed only to render a highly selective form of "overhead" operation, restricting their service to selected major cities. The examiners found that the carriers adequately serving the areas were dependent

3. At the time of the hearing, three carriers provided direct service between Atlanta and Dallas, focal points of the proceeding. At the time of the Commission's decision there were 13 such carriers. Similar expansions occurred without exception at every city involved (App. J 766). The court below was furnished with a detailed analysis from the record demonstrating the specific increases that occurred at 14 of the principal cities involved. Plaintiffs' Brief (District Court), pp. 142-145. ("App." refers to the Joint Appendix to Jurisdictional Statements filed by appellants.)

4. Now termed "Administrative Law Judges." For consistency, the title "examiners," used in the record, will be utilized here.

5. No party has ever challenged the accuracy of the examiners' summary of the evidence as set forth in their 300-page report (App. J 751, 758).

on volume traffic at the larger cities (that would be served by applicants) in order for them to maintain service to the smaller communities (that would not be served by applicants). They recognized that if any of the applicants were permitted to superimpose its proposed service on that presently provided, it would result in forcing existing carriers to increase the amount of their empty vehicle operations within the area. For example, one appellee (Roadway) was then operating at least one empty truck per day from Texas to the East Coast, due to traffic imbalance, while another (Gordons) was operating empty vehicles more than one million miles per year[6]—highly "inefficient and wasteful" conditions that would be worsened by approval of any of the applications (*id.*, at 756, 768).[7]

Most of the unsuccessful applicants filed exceptions, challenging the examiners' conclusions but not their specific findings of fact (*id.*, at 758). At this stage of the proceedings, additional counsel entered the picture and new parties were permitted to intervene, resulting in the injection of political issues and arguments (*id.*, at 769, 786).[8]

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6. The facts are not in dispute. These findings were made by the examiners, by the division of the Commission that reviewed the findings, and acknowledged by the District Court (App. B 330, 345; App. J 756-757).

7. In view of the present energy crisis, the Commission recently reemphasized its long-standing policy of "minimizing or eliminating" empty vehicle movements. 38 Fed. Reg., No. 228, pp. 32856-7; No. 231, pp. 33355-6.

8. Appellants Lorch-Westway, *et al.* (Lorch) refer to contentions in one of their pleadings that was "never accepted for the record" to argue that the Commission did not, in fact, permit injection of political issues, as found by the court (J. S. 13-14, App. B). They failed, however, to cite their additional pleadings and briefs which argued that the Commission's implementation of the National Transportation Policy was contrary to policy positions taken by the President of the United States and the Department of Justice. See, e.g., Reply of Lorch to Petitions for Reconsideration, p. 5, and its Petition to Supplement Exceptions, p. 3; plaintiffs' Reply Brief (District Court), pp. 30-61.

The final administrative determination of the proceedings resulted in the reversal of the examiners' conclusions (but not their findings) as to three carriers (appellants here)[9] and the sustaining of their denial of the remaining seven applicants. This was by a two-to-one vote of a division composed of three of the eleven commissioners.[10] The eleven-member Commission declined to review this decision, holding that "no issue of general transportation importance is involved" (*id.*, at 748; J.S. Red Ball, App. B).

The present suit charged that the division's decision was invalid and prayed that the enforcement of its order be enjoined. In its opinion (App. J 739) the District Court summarized the division's report in detail and carefully set forth the reasons why it found the division's orders to be invalid. The court's opinion is clear and comprehensive. Briefly stated, the court concluded that there was no rational basis for the determinative findings and conclusions in the division's report. It found that the division arbitrarily and capriciously applied a discriminatory double standard, giving great weight to evidence

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9. Direct Atlanta-Dallas service, provided by three carriers at the time of the hearing and by 13 at the time of the decision, would be increased by this order to 16. See note 3, *supra*. The division, in its report, gives no indication that it was aware of these increases in service, although it was advised of such increases and although it acknowledged generally its duty to consider increases occurring during the pendency of the proceeding (App. C 106).

10. A dissenting opinion, favoring the denial of all applications, appears as a part of a subsequent decision by the same division after reopening the proceeding for the purpose of approving the application of one more applicant, Jones Truck Lines, Inc. See *Jones Truck Lines, Inc., Extension—Atlanta, Ga.*, 117 M.C.C. 586, 597 (1972). Appellees, as plaintiffs below, sought to supplement their complaint so as to seek review of *Jones* as a part of the present case; however, the court overruled these efforts (App. J 744), and a separate suit challenging *Jones* is now pending before the District Court for the Western District of Missouri, Springfield Division.

favorable to the appellant carriers while ignoring or expressly refusing to give weight to the same or similar evidence favorable to appellees, and, in some instances, justifying its refusal to give credence to evidence favorable to appellees by stating reasons that were equally applicable to evidence, favorable to appellant carriers, upon which its critical conclusions were based."[11]

The court, therefore, set aside the Commission's orders and enjoined the issuance of the certificates authorized therein, concluding that the division's findings and conclusions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 706 (2) (A). The court affirmatively refrained from expressing any opinion concerning the ultimate issue of public convenience and necessity, recognizing the Commission's exclusive prerogative to make such determination. When requested by post-judgment motion of the United States and Commission (United States) (App. K 795) to remand the proceeding to the Commission, the District Court concluded that the ends of justice would be best served by directing the Commission to make a determination of public convenience and necessity on the basis of a new record, holding that, under the peculiar circumstances of the case, further proceedings on the present record "would only create further confusion and result in injustice" (App. N 817).

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11. Lorch charges the District Court with holding the examiners' conclusions to be "nonreviewable by the Commission," thereby changing "the statutory relationship between hearing examiners and their agency" (J.S. 4, 19). The charge is unsupported. It is also directly contrary to the court's careful description of its review. As explained, the court considered both the examiners' report and the division's report precisely as directed by *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951). (App. J 776).

MOTION TO DISMISS APPEAL OF JOHNSON MOTOR LINES, INC., CASE NO. 73-1069

Appellees move to dismiss Case No. 73-1069 (Johnson), on the ground that this Court does not have jurisdiction over the appeal. Jurisdiction is lacking because the appellant failed to file a timely notice of appeal as required by 28 U.S.C. § 2101(b).

On September 11, 1973, the District Court entered its judgment (App. J 739-740), and on September 17, 1973, the United States timely filed a motion pursuant to Rule 59(e), F.R.C.P., seeking amendment of the judgment. The motion sought to have this case remanded to the Commission on the ground that the judgment was "a matter beyond the jurisdiction of the Court." (App. K 795). Subsequent to the filing of the motion to amend, but prior to a ruling on the motion, Johnson filed a notice of appeal on September 27, 1973, that resulted in the docketing of the above-numbered cause (App. L 801). On October 4, 1973, the District Court entered an order overruling and denying the motion for amendment of the judgment (App. N 807-808). Following entry of the order overruling the motion to amend judgment, timely notices of appeal were filed by all other appellants *except* Johnson (Apps. M, O, P, Q 803, 825, 827, 831).

The *only* notice of appeal filed by Johnson was that notice filed while the motion to amend judgment was pending.[12] Accordingly, at the time Johnson filed its no-

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12. Bowman also filed a notice of appeal while the motion was pending, but, unlike Johnson, Bowman filed a second notice of appeal after the motion was denied (App. M 803). All of the appellants recognize that Johnson sought to appeal only from the judgment of September 11, 1973, whereas all other appellants appealed from that judgment *and* the order of October 4, 1973 overruling the motion to amend (Application to Fix Time or For Extension of Time to Docket Case on Appeal and to File Jurisdictional Statements, App. R 836, n. 1).

tice of appeal, the judgment appealed from was not a final, appealable judgment.

Under almost identical circumstances, this Court, in *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 177 (1944), sustained a motion to dismiss, stating:

> "The motion to amend the findings tolled the time to appeal if it was not addressed to 'mere matters of form but raised questions of substance' e.g., if it sought a 'reconsideration of certain basic findings of fact in the alteration of the conclusions of the court.' Leishman v. Associated Elec. Co., 318 U.S. 203, 205. An examination of the motion makes plain that matters of substance were raised. The appeal . . . was accordingly premature. Zimmern v. U.S., 298 U.S. 167."

Here the motion to amend, as in *Crescent, supra*, "raised questions of substance," for the District Court was asked on jurisdictional grounds to reverse its finding and conclusion that "no useful purpose would be served by remanding this matter to the Commission" (App. J 787-788).

Dealing with a comparable situation in *Zimmern* (cited in *Crescent*), this Court stated that, at the time the notice of appeal was filed, the operation of the judgment had been suspended "so that no appeal could be taken from it until it had been amended or confirmed." 298 U.S., at 169. See, *e.g.*, *Forman* v. *Davis*, 371 U.S. 178, 181 (1962); *Leishman* v. *Associated Wholesale Elec. Co.*, 318 U.S. 203 (1943); *Morse* v. *United States*, 270 U.S. 151 (1926). Considering it unnecessary to cite authority, this Court quite recently reaffirmed its well established position on this question, holding that "[a]ppellees' motion for reconsideration . . . suspended the finality of the judgment . . . until

the District Court's denial of the motion . . . restored it. Time for appeal thus began to run from [the denial of the motion]. . . ." *Communist Party of Indiana* v. *Whitcomb*, 2 U.S.L.W. 4129, 4130 (Jan. 9, 1974).[13]

In effect, Johnson has not filed that notice of appeal required by 28 U.S.C. § 2101(b) which allows the jurisdiction of this Court to attach. Therefore, the appeal in No. 73-1069 should be dismissed.

THE QUESTIONS ARE NOT SUBSTANTIAL

The District Court Heard Oral Argument from All Parties

Three appellants (Red Ball, Johnson and Lorch) argue that the court below improperly curtailed or refused to hear oral argument on the issues decided.[14] This is a frivolous contention. The first hearing was before Senior District Judge Miller on plaintiffs' application for a temporary restraining order, and at that time "[t]he questions involved were extensively and thoroughly argued orally." 350 F. Supp. 539, 541 (1972). Subsequently, the parties filed "extensive briefs" on the merits (App. J 744).[15]

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13. The principle applied by this court in the cited cases is embodied in Rule 4 of the Federal Rules of Appellate Procedure for the United States Courts of Appeals.

14. Johnson, for example, argues that the District Court "did not hear oral argument on the merits of the action," and that the court made plain "its belief that oral argument was unnecessary." (J.S. Johnson 6). Red Ball charges that only one judge heard any argument concerning the Red Ball case during the hearing for a temporary restraining order, that the arguments before the three-judge court did not deal with the merits of the case and, further, that this constituted a failure to comply with "a jurisdictional requirement" (J.S. Red Ball 19). Lorch quotes fragmentary phrases from the transcript in a way that suggests that the court *refused* to hear oral arguments (J.S. 7, 8).

15. Specifically, plaintiffs' initial brief comprised 220 pages. Defendants' five briefs exceeded 322 pages, with more than 600 pages of appendices and exhibits. Plaintiffs' reply brief covered 73 pages.

These briefs were submitted to each judge prior to the time the court convened to hear arguments on plaintiffs' motion to supplement the complaint and defendants' motion to terminate the temporary restraining order.[16] During the course of that hearing, the judges made reference to their prior study of the briefs (see, *e.g.*, App. E 567-568, 581-582), and in their oral arguments, *counsel for appellants* emphasized that they "have fully briefed this case," and that the questions "have been thoroughly briefed and are ripe for judicial review" (*id.*, at 531, 558).

Instead of announcing, as contended by these appellants, that oral argument would *not* be heard, Chief Judge Mehaffy observed at the outset that he had had experience in cases of this type and that the court would not permit "fifteen lawyers" to "argue it orally." Instead, he requested that counsel "separate it in groups" and have one lawyer "speak for a group and not have any fifteen arguments or lawyers more or less arguing the same thing." He emphasized that the court would proceed "in an orderly manner and in such a fashion that will give everybody fair treatment" (*id.*, at 458, 460). The court then proceeded to hear oral arguments on the pending motions. However, these arguments became quite extensive, dealing in detail with the merits of the case as well as with issues raised by the motion. For example, counsel for the Commission acknowledged that "Judge Miller is familiar with the facts and background of this case," but for the benefit of the other judges he considered it advisable to "go back a bit and start in the year 1964." He then proceeded to give a detailed history of the proceeding and argued orally the basic contentions embodied in the Government's brief[17]—

16. Plaintiffs' motion was overruled, whereupon defendants' motion was withdrawn (App. E 564, 565).

17. Stating: "I don't know what else can be said about the Commission's order. . . ." (*Id.*, at 507).

an oral argument comprising 36 pages of the reporter's transcript (*id.*, at 480-515).

Next, counsel for Johnson spoke as representative of all intervening defendants, announcing that "I will talk generally about the interests of the intervening defendants in the original action" (*id.*, at 530).[18] After emphasizing the thoroughness of the briefs previously filed, counsel announced to the court that "we are ready to go—on the merits of this case. Let's get to these merits . . . they [appellants] want the decision on the merits now" (*id.*, at 531, 532).

Counsel for appellees then announced that appellees were in agreement with appellants' suggestion that the case be submitted, but asked the court "to allow us seven days to submit our findings of facts and conclusions of law" (*id.*, at 550).

Counsel for Bowman thereupon announced that "[w]e are in absolute accord" with the suggestion that the case "is ripe for judicial proceeding with dispatch and toward an early decision." He urged the court to render "[a]n immediate decision on those issues," and stated that "we join in the proposition that we submit . . . proposed facts and conclusions within the seven day period" (*id.*, at 555-556).

When confronted with the requests by counsel for all parties that the case be forthwith submitted and promptly decided, Judge Williams asked counsel for Bowman:

18. Counsel for Bowman subsequently argued briefly (*id.*, at 558-559, 578-581); counsel for Lorch made comments (*id.*, at 568, 581); counsel for Red Ball was present but said nothing (*id.*, at 453-454).

"Is there any matter that has not been thoroughly briefed so far as you and your client are concerned that you would care to raise in additional oral argument?" (*Id.*, at 558).

Counsel for Bowman responded that the cases "have been thoroughly briefed and are ripe for judicial review." Judge Williams then asked again if anything further could be added in oral argument "other than what you have already said." Counsel replied that he would like to file "some brief answer to the reply brief which we feel raised some new matters," explaining that this could be handled in a brief "filed along with the proposed stipulations or conclusions of law and findings of fact that would encompass a suggested order to this court for its consideration" (*id.*, at 558-559).[19]

Following a recess to consider the proposals submitted by the parties, Judge Miller, speaking for the court, announced that:

". . . unless there is someone that desires to submit further arguments on the merits of the . . . main case, . . . if there is no further arguments to be submitted on that, we are going to submit that case and take it under consideration and proceed to prepare some decision in that case as quickly as we can" (*id.*, at 566).

Judge Miller then asked, *once again*, if any party had "any objections to that" procedure, whereupon appellant counsel requested a recess to confer among themselves, then Commission counsel, speaking for all appellants, stated: "Your suggestion is acceptable to us" (*id.*, at 567-568). The court thereupon granted the parties' joint request for permission to file proposed findings of fact and conclusions

19. Although the court granted permission for the filing of such additional brief, none was filed (*id.*, at 556-557).

of law and then took the case under advisement for decision (*id.*, at 568-570).[20]

It is abundantly clear, therefore, that the court convened, on July 24, 1973, with an announced plan to dispose of the motions then pending and reconvene in two weeks to hear oral arguments on the merits (*id.*, at 457-458). However, after being urged by counsel for all parties to take the case under immediate submission, receive proposed findings and conclusions of law, and render a prompt decision, the court accepted these suggestions and proceeded to render its decision pursuant to the *exact procedure* urged by *all* counsel.

Appellants' contentions concerning inadequate oral argument are clearly improper.

There Is No Basis for Appellants' Charge That the District Court Failed to Review the Record

Certain appellants have levelled a serious and wholly unwarranted attack upon the judicial integrity of the District Court. In its opinion, signed by all three judges,[21] the court stated that it reached its conclusion ". . . after full consideration of . . . the pertinent portions of the entire record" (App. J 748, 788). These appellants[22] charge that this was a misrepresentation by the court; that there was, in fact, *no* review by the court of "any significant portion

20. Counsel for Lorch accuses the court of referring to briefs as "window dressing." (J.S. 8). This comment (App. E 582), made by one judge to another, had to do with a collateral argument concerning alleged misrepresentations in one of the briefs and counsel's request for an opportunity to respond to such assertions.

21. Chief Judge Pat Mehaffy, Court of Appeals, Eighth Circuit; Senior District Judge John E. Miller; and District Judge Paul X Williams.

22. The Jurisdictional Statement filed on behalf of the United States does not embrace these assertions.

of the record made before the Commission" (J. S. Red Ball 10). Appellants' charge is supported solely by an affidavit, containing hearsay statements, executed by an attorney for certain appellants.[23]

Appellees have refrained from filing a motion to strike counsel's affidavit and the arguments based thereon, since we do not rely solely upon the general proposition that assertions of this type will not be considered on appeal.[24] In order to dispel any possible doubt concerning the propriety of the District Court's motives and conduct, appellees prefer to demonstrate the impropriety of such charges.

In reaching its conclusions, the District Court had before it the complete record made before the Commission. In addition, *each individual Judge* was furnished with the following: (a) A comprehensive abstract of the evidence prepared by Johnson and Bowman (7 volumes; 3,200 pages); (b) another comprehensive abstract of the evidence prepared by Red Ball and certain appellees (7 volumes; 1,647 pages); (c) an extensive summary of the evidence contained in the 300-page report of the examiners; (d) another summary contained in the Commission's 225-page report; and (e) seven comprehensive briefs containing detailed quotations and summaries of the evidence (over

23. The affiant does not appear of counsel on the only Jurisdictional Statements that contain his affidavit (Red Ball, Johnson and Bowman) but does appear of counsel on the other Jurisdictional Statement (Lorch) that asserts contentions based on such affidavit.

24. Charges of this type are improper and may be stricken or wholly disregarded by the court. R. Stern and E. Gressman, Supreme Court Practice 477 (4th Ed. 1969). The practice of inserting in briefs language that tends to impugn the "motives or conduct" of the trial court is strongly disapproved and "statements objectionable in this regard will not be considered." 5 C.J.S. *Appeal and Error*, § 1327 (1958). This court will not ordinarily consider matter dehors the record, whether by affidavit or otherwise. 36 C.J.S. *Federal Courts*, § 201(9)m, at 346; 4A C.J.S. *Appeal and Error* §§ 1206, 1211.

1,200 pages). Each judge therefore had before him summaries, excerpts, charts and briefs totaling approximately 6,600 pages.[25]

In reaching its conclusions, the court stated that it gave "full consideration" or "careful consideration" to the following:

1. "[T]wo sets of detailed abstracts of the evidence . . . [that] are strikingly similar and provide an accurate summary of the evidence" (App. J 746, 775).

2. "[C]omprehensive findings of fact embodied in the appendices to the Examiners' Report and to the Division's Report. No challenge was made by any party to the accuracy of the findings of fact and, collectively, they present a comprehensive summary of the evidence" (*id.*, at 775-776).

3. "[E]xtensive and thorough briefs . . . submitted . . . in support of the respective contentions of the parties in interest . . . ." (*id.*, at 748).

4. "[P]roposed findings of fact and conclusions of law submitted by the parties" (*Ibid.*).

5. "[A] great many of the exhibits" (*Ibid.*).

6. "[P]ertinent portions of the entire record" (*Ibid.*).

All counsel and the court recognized that voluminous portions of the record are inapplicable to the three applications that are the subject of the suit.[26]

25. With the exception of the briefs, this material duplicated documents contained in the record.

26. *E.g.*, counsel for Johnson, in response to questions from the court, placed emphasis on the fact that much evidence of record had no relationship to the Johnson, Bowman and Red Ball case (App. E 536). The court so found (App. J 775). Specifically, 506 of the 933 public witnesses were presented by applicants *other* than the three here involved. Some witnesses supported more than one applicant; *e.g.*, 746 supported the seven applicants *other* than Johnson, Bowman and Red Ball. (Examiners' Report, p. 4; District Court brief of United States, App. II.)

During the oral arguments the court acknowledged the physical difficulties presented in examining such a large record (App. E 510, 514-515, 547). In recognition of these difficulties, counsel furnished to the court copies of those portions of the record pertinent to their contentions. All parties quoted extensively from the record in their briefs, and each included detailed appendices or exhibits containing specific matters relied upon.[27]

Of paramount significance, however, is the fact that counsel for appellants *urged* the court *not* to review the original record of the hearing before the Commission, but, instead, *to rely upon the detailed abstracts prepared by the parties summarizing all oral and documentary evidence presented at the consolidated hearing.*

Counsel for Johnson commended the seven-volume abstract prepared jointly by Johnson and Bowman as follows:

> "This work, containing in excess of 3,200 pages, capsules this huge record into workable proportions. A set of these volumes is a part of the agency record being certified to this Court. Counsel for intervening defendants are making a set available to each of the judges on the three-judge panel designated to hear this action." (Johnson Brief 9).

Counsel for Bowman, speaking of the same abstracts, stated:

> "At the conclusion of the hearing, we carefully studied and digested all of the testimony and exhibits and submitted to the Commission an abstract, not from the standpoint of advocates, but with a sincere effort to present the summary in an impartial factual manner, emulating to the best of our ability the judicial approach. . . . Copies of the seven (7) volume abstract are being made available to the Court . . . . *It is hoped that the Abstract will assist the Court and serve as a basic reference for any factual statements made in Commission orders or briefs.*" (Bowman Brief 3-4) (Emphasis added).

27. *E.g.*, Lorch filed a series of exhibits consisting of 435 pages of summaries and tables.

Initially, appellees' counsel did not furnish the court copies of their 1,647-page abstract (prepared jointly with Red Ball), since it was included as a part of the record that had been filed; however, *at the request of the court*, extra copies were furnished.[28]

The APA requires the court to "review the whole record *or those parts of it cited by a party.*" 5 U.S.C. § 706(2) (Emphasis added). This is precisely what was done by the District Court.

The District Court Followed Proper Procedures in Preparing Its Opinion

Certain appellants have suggested that the three judges of the lower court did not perform their judicial function. The court is charged with "adopting verbatim" or "mechanically adopting" the findings of fact and conclusions of law proposed by appellees.[29]

As previously noted, the District Court considered briefs and oral arguments on every facet of this case,

28. In addition to the two sets of abstracts included as a part of the Commission record, extra copies, as filed below, are also included in the record before this Court. (See District Court clerk's certification.) Appellant Red Ball, while recognizing that the abstracts "accurately reflect a summary of the testimony of the witnesses," suggests that the exhibits could be examined only from the basic record (J.S. Red Ball 10). However, as stated by other appellant counsel, the abstracts summarized *all* evidence, oral and documentary.

29. The United States has not advanced such an argument.

and stated that it welcomed the submission by all parties of proposed findings and conclusions prior to the rendering of its decision (App. D 571-572).[30]

The District Court did not "mechanically adopt" appellees' proposals. The court wrote its own opinion. After summarizing its study of the record, the briefs, and the findings and conclusions proposed by appellants and appellees, it adopted appellees' proposals after finding that they "are correct".[31] The court added other comments and quotations not included in appellees' proposals.[32] The action of the District Court in preparing its opinion is neither error, nor an abdication of judicial function, and most certainly is not a basis for this Court to note probable jurisdiction. *United States* v. *El Paso Natural Gas Company*, 376 U.S. 651 (1964).

The United States submitted proposed findings and conclusions, containing three blank signature lines for the

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30. The court entered two orders providing for the submission of proposed findings and conclusions. (District Court clerk's certification, doc. nos. 75, 76, Vol. IV.)

31. "Extensive and thorough briefs have been submitted to the court in support of the respective contentions of the parties in interest and proposed findings of fact and conclusions of law have been received, which the court has studied, along with a great many of the exhibits and the Report of the Examiners and the Division 1 Report.

"After full consideration of the contentions of all the parties, the pertinent portions of the entire record, and the proposed findings of fact and conclusions of law submitted by the parties, the court is convinced that the proposed findings and conclusions submitted and requested by plaintiffs are correct, and they are adopted by the court as hereinafter set forth." (App. J 748)

32. *E.g.*, appellees proposed a single sentence recording the court's refusal to review *Jones* (App. I 699); the court wrote over five pages (App. J 789-794). The court's independent research is reflected by its quotation from, and citation to, cases not quoted or cited in appellees' proposal and the changes it made in appellees' proposed conclusion (*id.*, at 774, 776, 788). The procedure followed was that commended in *Schilling* v. *Schwitzer-Cummins Co.*, 142 F.2d 82 (CADC 1944).

judges to sign (App. F 585-609). Red Ball, Johnson and Lorch actually submitted a "Proposed Opinion" together with findings and conclusions with similar signature spaces (App. G 615-645). Bowman was not at all subtle—the document it submitted was entitled "Opinion," with signature spaces (App. H 647-695). The appellees submitted only "Proposed Findings of Fact And Conclusions of Law" (App. I 697-738).

All parties understood that the District Court desired to have the benefit of proposed findings and conclusions prior to its reaching a decision.[33] This procedure is consistent with local practice and the Federal Rules of Civil Procedure.[34]

The District Court followed the guidelines of the Eighth Circuit set forth in *Bradley* v. *Maryland Casualty Company*, 382 F.2d 415, 423 (1967), cited by Bowman (J.S. 7, 8). Judge, now Justice, Blackmun, applied the holding of *El Paso*, *supra*, and determined that the adopted findings were "clearly supported by the evidence and not vulnerable."[35] The District Court's opinion in the case at bar likewise is carefully drawn, includes material not contained in appellees' proposed findings, and cites many of the cases cited by appellants. The complaint of these appellants is with the decision reached by the court, not with the use of appellees' proposed findings and conclusions.

This Court held in *El Paso*, *supra*, that findings and conclusions prepared by counsel and adopted by the court

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33. See note 30, *supra*.

34. Rule 13, Rules of The United States District Courts for the Eastern and Western Districts of Arkansas, permits the court to direct the filing of proposed findings of fact and conclusions of law; Rule 52(a), F.R.C.P.

35. Judge Mehaffy, a member of the three-judge panel, was also a member of the panel which considered *Bradley*, *supra*.

are satisfactory unless unsupported by the evidence, even though the lower court there announced its decision and told prevailing counsel to prepare the findings and a judgment. Mr. Justice Douglas stated:

> "Those findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence. *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 184-185." 376 U.S. at 656.[36]

In *Crescent, supra*, Mr. Justice Douglas, after noting the defendants' allegation that the court's findings were "mainly taken verbatim from the government's brief," stated:

> "But they are nonetheless the findings of the District Court. And they must stand or fall depending on whether they are supported by the evidence. We think they are." 323 U.S., at 184-185.

While appellants refer to other cases, it should be noted that none of the court of appeal cases cited by appellants reversed because of the trial court's use or "verbatim adoption" of proposed findings prepared by counsel. It should also be noted that each of the later decisions relied upon by appellants actually cite *El Paso* for the principle that the findings, *not who authored them*, are the important consideration.[37] In addition, some of the recent

36. See also concurring opinion of Mr. Justice Harlan: "Nevertheless, if they are supported by evidence, they are not rendered suspect simply because the trial court, as here, has accepted *in toto* the findings proposed by one side or the other." 376 U.S., at 662-663.

37. *Industrial Building Materials, Inc.* v. *Interchemical Corporation*, 437 F.2d 1336, 1339 (CA9 1970); *In re Las Colinas, Inc.*, 426 F.2d 1005, 1009 (CA1 1970); *Bradley* v. *Maryland Casualty Co.*, 382 F.2d at 423; *Featherstone* v. *Barash*, 345 F.2d 246, 251 (CA10 1965).

decisions of the courts of appeals not only cite *El Paso*, but also hold that all findings of fact and conclusions of law are to be considered on an identical standard regardless of whether they were court originated or party suggested.[38] While appellants cite and quote *Roberts* v. *Ross*, 344 F.2d 747 (CA3 1965), they have ignored the finding therein which is pertinent to the present situation, namely: "Most of the reported cases which have approved findings and conclusions which the trial judge has adopted in the form prepared by counsel without change involve findings and conclusions submitted before decision." 344 F.2d, at 747, n. 4.

Appellants' unfortunate interchange of the terms "findings," "judgment" and "opinion" of the District Court is improper. The District Court's opinion and judgment were its own product, and neither was suggested or offered by appellees. A contention similar to the due process argument presented by Red Ball (J.S. 14), concerning the adoption of appellees' proposed findings, was considered and rejected in *Bradley, supra*. Likewise, appellants' reliance on *Ayrshire Collieries Corp.* v. *U. S.*, 331 U.S. 132 (1947), is misplaced, because here the District Court was properly convened and all judges participated in the decisions, opinions and judgments of the court, as required by 28 U.S.C. §§ 2284, 2325.

The suggestion that Judges Mehaffy, Miller and Williams acted improperly or abdicated their judicial function by utilizing appellees' proposed findings is unworthy of consideration by this Court. Appellants should not be heard to question the integrity of the three judges simply

38. *Eli Lilly & Co.* v. *Generix Drug Sales, Inc.*, 460 F.2d 1096, 1099 (CA5 1972); *Railex Corporation* v. *Speed Check Co.*, 457 F.2d 1040, 1042 (CA5 1972); *In re Flora Mir Candy Corporation*, 432 F.2d 1060, 1062 (CA2 1970); *Schnell* v. *Allbright-Nell Co.*, 348 F.2d 444, 446 (CA7 1965).

because their view of the law did not coincide with that of the judges who objectively considered the record, the briefs and the oral arguments.

The District Court Applied Proper Standards of Judicial Review

Appellants allege that the District Court utilized an improper standard of judicial review—that the APA does not authorize the court to hold unlawful and set aside agency decision *in an adjudicatory proceeding* found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Appellants charge that the District Court decision creates a "new standard" (J.S. Johnson 13), or "novel standard" (J.S. United States 9), or "Novel Concept of De Novo Judicial Review" (J.S. Lorch 16). More specifically, it is asserted that:

> ". . . absent questions of the agency's authority which are not involved here, an agency determination in adjudicatory proceedings which is supported by substantial evidence cannot properly be found to be 'arbitrary or capricious.' " (J.S. United States 10).

It should be emphasized that the District Court's recognition of its limited scope of review is fully consistent with the contentions of all parties; and, further, that the court carefully refrained from usurping the agency's functions. At the same time, the court responded to the requirements of the APA and reviewed the agency proceeding in accordance with the statute and the cases decided thereunder. In performing this function the court was called upon to decide whether the division acted arbitrarily and capriciously in applying different standards to its consideration of the evidence. The court found that a discriminatory double standard was applied in arriving at the determinative findings and conclusions in the division's report. The court's opinion clearly enumerates those errors of law. They include, *inter alia*:

(1) Refusal to give credence to appellees' voluminous traffic (transit-time) studies on the ground that they covered periods of time subsequent to the filing of the applications, while basing critical findings favorable to appellant carriers upon their own studies that covered similar or later periods (App. J 763-764, 772, 779).

(2) Refusal to give credence to appellees' traffic studies on the ground that they covered short periods of time, while basing critical findings favorable to appellant carriers upon their own studies that covered identical or shorter periods (*id.*, at 762-763, 778-779).

(3) Basing critical findings, favorable to appellants, on portions of shipper-sponsored traffic studies, while refusing to make findings, favorable to appellees, based on other portions or summaries of the same exhibits (*id.*, at 781).

(4) Basing critical findings, favorable to appellants, on portions of appellants' own traffic studies, while refusing to make findings, favorable to appellees, based on other portions or summaries of the same exhibits (*id.*, at 780).

(5) Basing critical findings, favorable to appellants, on service restrictions of appellees in official tariffs, while refusing to make findings, favorable to appellees, on identical or similar restrictions of appellants in the same tariffs (*id.*, at 764-765, 781).

(6) Official notice by the division (on its own motion) of facts in an industry publication, favorable to appellants, while refusing (upon request of appel-

lees) to take notice of similar facts, unfavorable to appellants, appearing in the same publication (*id.*, at 765, 781-782).[39]

Clearly, this action by the division ". . . was an exercise of arbitrary power, at variance with 'the rudiments of fair play' . . . long known to our law." *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U.S. 63 (1935). The exercise of such arbitrary power led the court below to conclude that the division's report "sounds more in advocacy than in impartial adjudication" (*id.*, at 787).

After making the findings discussed above, the court recognized that the law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated (*id.*, at 779). As stated in the concurring opinion in *Mary Carter Paint Co.* v. *FTC*, 333 F.2d 654, 660 (CA5 1964), *rev'd on other grounds*, 382 U.S. 46 (1965), "there may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case." As the decision below makes clear, the error of the Commission was that it acted arbitrarily and capriciously in applying different standards and that, therefore, the error was one of *law*, not of fact (*id.*, at 774).

Legal error is further demonstrated by the court's recognition of the division's failure to make any "comparative analysis of the quantity of service available between any of the involved points" (*id.*, at 782). While professing to "take official notice" of recent increases in available service (App. C 106), as it was required to do, the division made no analysis, evaluation or acknowledgment of the

39. The division made critical findings of facts from the record, favorable to appellants, that were *directly contrary* to the more current facts that appeared in the officially-noted publication (App. B 148; App. J 765, 781-782).

tremendous changes that occurred while the proceeding was pending (see notes 3 and 9, *supra*). The division was apparently unaware of the impact of its order (*id.*, at 782-784).

Viewing the record in its entirety, consistent with *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), the court further determined that the decision of the Commission was not based upon the entire record, did not meet the requisite of clarity, included ultimate conclusions based on subordinate findings unsupported by consideration of the entire record, and was, therefore, arbitrary and capricious (*id.*, at 776-778).

While the court made other and similar findings and conclusions, the foregoing demonstrates that the court did not weigh the evidence. It dealt in terms of errors of law. Indeed, it was the court's responsibility to do so under 5 U.S.C. § 706.

The District Court recognized its limited scope of review but concomitantly recognized that it must find whether there was a rational basis for the conclusions reached by the agency; otherwise, the reviewing court would have little, if any, function.[40]

Certain appellants argue that, in applying 5 U.S.C. § 706, "the District Court misread the decision in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402." (J.S. Lorch 17). The United States goes further. It asks this Court to modify its holding in *Overton* and establish a limitation on the scope of judicial review that is directly contrary to the APA, to this Court's rulings in other cases,

40. ". . . [T]he court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." In so doing it must engage in "a thorough, probing, in-depth review." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415, 416 (1971).

and to decisional law consistently followed by other federal courts over a long period of years.

The United States does not contend that the District Court did not have adequate grounds for finding the division's actions to be arbitrary and capricious. Instead, it takes the position that the court lacked authority to even consider such a question in reviewing this adjudicatory proceeding. It contends that in such cases the court cannot find agency action to be "arbitrary or capricious" if such action is "supported by substantial evidence." (J.S. United States 10).

This contention does violence to the statute and established decisional law. As stated by this Court in *Overton*, 401 U.S., at 413-414, in determining the standard for review, "we must look to § 706 of the Administrative Procedure Act, 5 U.S.C. § 706 . . . which provides that a 'reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found' not to meet *six separate standards.*"[41] (Emphasis added). Under the first of these

41. 5 U.S.C. § 706 provides:

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(Continued on following page)

"six separate standards," the decision must be set aside if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Under the fifth standard, it must be set aside if "unsupported by substantial evidence"; but, "the substantial-evidence test is authorized only when the agency action is taken pursuant to a rule-making provision of the Administrative Procedure Act . . . or when the agency action is based on a public adjudicatory hearing." 401 U.S., at 414.[42] Since the action in the case at bar was based upon an adjudicatory hearing, appellants argue that, under *Overton*, the substantial-evidence test is the *only* test to be applied. This is directly contrary to this Court's clear statement in *Overton* that:

> ". . . In *all* cases agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements." (*Ibid.*) (emphasis added).

Apparently recognizing that their argument does violence to the statute, counsel contend that, in reviewing agency action based on adjudicatory hearings, a court should apply *only* the substantial-evidence test "absent questions of the agency's authority." (J.S. United States

Footnote continued—

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

42. *Accord, Camp* v. *Pitts*, 411 U.S. 142 (1973).

10). No explanation is given why counsel concedes that standard No. 3, involving agency authority, is applicable to *all* cases, while denying applicability of the other standards. Standards No. 2 and 4 are in no different position than standard No. 3. Under the second, agency action must be set aside if it was contrary to constitutional right, power, privilege, or immunity, and, under the fourth, if lawful procedure was not observed. They argue that if substantial evidence can be found, the agency's order must be upheld even though it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *A fortiori*, it follows that if the substantial-evidence test can be met, it matters not that the agency violated constitutional rights or procedural requirements. This, of course, not only flies in the face of the statute[43] and plain logic, but is manifestly contrary to the holding in *Overton* that in "all cases" agency action must be set aside if it was arbitrary or capricious, or failed to meet statutory or procedural requisites, or was contrary to constitutional requirements.

Appellants' contentions are also contrary to this Court's recent rulings in *Atchison, T. & S. F. R. Co.* v. *Wichita Bd. of Trade*, 412 U.S. 800 (1973). In that case, a district court set aside an order of the Commission *even though it expressly found that the Commission's conclusions were supported by substantial evidence* (352 F. Supp. 365, 367), and, on appeal, that finding was not challenged.

43. Among other things, a reading of § 706 refutes the argument. The statute is plain on its face, and § 706(2) clearly sets out six tests in separate subsections. The disjunctive term "or" is employed in a statute to show that the failure to comply with *any* requirement therein imposes liabilty. 1A Sutherland Statutory Construction § 21.14 (C. Sands 4th ed. 1972). Furthermore when, in a statutory enumeration of things, the disjunctive term "or" is placed immediately before the last number of the series (as between § 706(2)(E) and (F)), the term "or" is understood to exist between the previous members. 50 Am. Jur. *Statutes* § 281, at 267.

After noting this finding, however, this Court agreed with the district court that the Commission's order was invalid for other reasons.[44] The Commission's order was not set aside because of lack of "the agency's authority" or because it was not "supported by substantial evidence." If the contentions now asserted by appellants in the case at bar had been adopted in *Atchison*, this Court's review of the agency's order there would have ended with its recognition that the order was supported by substantial evidence.[45]

Appellants challenge the District Court's adherence to a principle of judicial review that has been consistently followed by other district courts reviewing Commission proceedings. For example, in *Clearfield Cheese Co.* v. *United States*, 308 F. Supp. 1072 (W.D. Mo. 1969), the court clearly recognized the separate nature of the six statutory tests.[46] That case was recently cited as authority for this proposition in *Florida Terminal & Trucking Co.* v. *United States*, 363 F. Supp. 1355, 1359 (M.D. Fla. 1973).

In the case at bar, the District Court relied upon other decisions in which Commission orders in adjudicatory proceedings were set aside, *not for lack of substantial*

44. Separate opinions were issued. The opinion by Mr. Justice Douglas describes several errors of law in the Commission's decision.

45. It should be noted that the argument advanced on behalf of the Commission in the case at bar was *not* advanced on behalf of that agency as an appellant in *Atchison*.

46. "Section 706, Title 5, USC . . . states that review shall be on the 'whole record' and that the reviewing court shall 'hold unlawful and set aside agency action, findings and conclusions found to be' arbitrary, capricious, abuse of discretion, or otherwise unlawful *or* contrary to a constitutional right, power, privilege or immunity, *or* in excess of agency jurisdiction, *or* unsupported by substantial evidence, *or* arrived at without observance of lawful procedures *or* 'unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.'" 308 F. Supp., at 1074 (emphasis added).

evidence, but because they were based upon findings that were arbitrary or capricious. These include *Campbell Sixty-Six Express, Inc.* v. *United States*, 258 F. Supp. 529 (W.D. Mo. 1966), in which the court recognized that the terms "arbitrary" and "capricious" mean "without rational basis." In the case at bar, the District Court made identical findings and conclusions, setting aside the Commission's order for the identical reasons enunciated in *Campbell*[47] (App. J 777, 785).

The District Court also relied upon: *Columbia Shippers and Receivers Ass'n, Inc.* v. *United States*, 301 F. Supp. 310, 319 (Del. 1969), wherein the court stated that "*in addition* to the 'substantial evidence' test generally applicable to this action," § 706(2)(A) of the APA requires that the reviewing court hold unlawful and set aside agency action, findings and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (emphasis added); *Eastern Central Motor Carriers Ass'n* v. *United States*, 239 F. Supp. 591, 594 (D.C. 1965), in which the court recognized that agency action must be set aside if it is "either" arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, *or* in excess of statutory jurisdiction, *or* unsupported by substantial evidence; *Mitchell Bros. Truck Lines* v. *United States*, 225 F. Supp. 755, 758 (Ore. 1963), *aff'd* 378 U.S. 125 (1964); *Heavy-Specialized Carriers Conference* v. *United States*, 231 F. Supp. 968, 970 (E.D. Mo. 1964); *Nashua Motor Express, Inc.* v. *United States*, 230 F. Supp. 646 (N.H. 1964); *Youngblood Truck Lines, Inc.* v. *United States*, 221 F. Supp. 809, 812 (N.D. N.C. 1963); *Omaha Grain Exchange* v. *United States*, 194 F. Supp.

47. Although, in *Campbell*, the Commission's order granting a certificate was set aside, with no remand, for the identical reasons assigned in the case at bar, the United States and Commission did not appeal.

929, 934 (Neb. 1961); and *Stott* v. *United States*, 166 F. Supp. 851, 855 (S.D. N.Y. 1958).

The District Court Properly Declined to Remand

The Interstate Commerce Act provides for an action to "enjoin" an order of the Interstate Commerce Commission.[48] Jurisdiction is vested in district courts by 28 U.S.C. § 1336(a) to, *inter alia*, "enjoin . . . any order of the Interstate Commerce Commission." Title 28 U.S.C. § 2325 authorizes a three-judge court to enter a "permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission. . . ."

While remand to the agency may be proper, it is *not mandatory*. *E.g.*, *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.*, 383 U.S. 576 (1966); *American Trucking Ass'ns, Inc.* v. *United States*, 364 U.S. 1 (1960). In *Zuber* v. *Allen*, 396 U.S. 168, 196 (1969), a permanent injunction against the agency order was affirmed, the court noting that "counsel for the . . . [agency] has advanced no new theory for sustaining the order."

In *Atlantic Coast Line*, 383 U.S., at 601, the Court stated that a court can finally dispose of the matter "without any necessity for a remand to the Commission." A remand was ordered because of "the particular circumstances of [the] case" in *American Trucking Ass'ns*, 364 U.S., at 17; however, this Court made it quite clear that no remand would have been ordered except for those "particular circumstances."

This Court has affirmed district court decisions in which no remand to the Commission was ordered. *E.g.*, *Shannon* v. *United States*, 219 F. Supp. 781 (W.D. Tex.

48. 49 U.S.C. §§ 17(9), 305(g) and (h).

1963), *aff'd*, 377 U.S. 311 (1964),[49] and *Pacific Coast Wholesalers Ass'n* v. *United States*, 81 F. Supp. 991 (S.D. Cal. 1949), *aff'd* 338 U.S. 689 (1950).[50]

Examples of cases where three-judge district courts "permanently enjoined" or "vacated, annulled and set aside" orders of the Commission and in which the United States and the Commission did not appeal are *Garrett Freightlines, Inc.* v. *United States*, 324 F. Supp. 575 (Idaho 1971); *Ashworth Transfer, Inc.* v. *United States*, 315 F. Supp. 199 (Utah 1970); *Pennsylvania R.R.* v. *United States*, 202 F. Supp. 584 (E.D. Pa. 1962), and *Campbell Sixty-Six Express, Inc.* v. *United States*, 258 F. Supp. 529 (W.D. Mo. 1966).

It is clear, therefore, that under the statutes and the decisions, remand to the Commission is not mandatory.[51] Yet, the only issue presented below was "that the proceeding *must* (*not should*) be sent back to the Commission" (App. N 815).[52] The second question, whether the proceeding *should* have been remanded, was not raised below and therefore should not be considered by this Court. This Court has long held that questions presented on appeal must have been fully presented below, *e.g.*, *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 371-372, n. 4 (1967);

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49. The three-judge court had found in setting aside an order of the Commission ". . . defendants should be permanently enjoined from enforcing the terms of said order. . ."

50. The form of the judgment provided "the same are hereby set aside and annulled and the enforcement thereof is hereby permanently enjoined." See App. N 818-819.

51. None of the cases cited by appellants holds to the contrary.

52. The sugggestion that remand be ordered was raised only in the post-judgment motion of the United States. The other appellants neither joined in nor supported such suggestion; however, Bowman and Johnson now assert this contention for the first time on appeal. (J.S. Bowman 25; J.S. Johnson 15).

Neely v. *Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967); *California* v. *Taylor*, 353 U.S. 553, 556-557, n. 2 (1957).

It should further be noted that the motion to amend the judgment revealed a misunderstanding of the scope of such judgment. It was argued that the court should not "bar the Commission from further consideration of the involved proceeding to determine where lies the public convenience and necessity" (App. K 798). In its opinion overruling the motion, the Court carefully explained that by no means had it barred the Commission from determining where lies the public convenience and necessity. The full scope and impact of the Court's judgment is succinctly explained in the Court's opinion on the motion:

> "The court's judgment simply enjoins issuance of the particular certificates authorized in the orders of the Commission held to be invalid. The motion does not contest the court's ruling that such orders are invalid, and, since such orders are invalid, their enforcement should be enjoined.
>
> "The judgment does not usurp the administrative functions of the Commission. It simply recognizes and holds that the present record should no longer be utilized by the Commission in its determination of the basic issue of public convenience and necessity. The Commission remains perfectly free to make a new determination of this issue, based upon a new record developed in the light of current facts and conditions. The Commission may direct that this record be developed separately for each of the applicants, or jointly in regard to all of the applicants, as deemed desirable by the Commission. The court has left all of these matters to the Commission and in no way has the court encroached upon the Commission's pre-

rogative to exercise its administrative functions" (App. N 822).

A very analogous situation is presented in *Office of Communication of the United Church of Christ* v. *FCC*, 425 F.2d 543 (CADC 1969), involving multiple applications for a television license. Having found the order erroneous, and rather than again remand, the court held that an entirely new proceeding should be instituted by the Commission. Judge, now Chief Justice, Burger, stated:

> "The record now before us leaves us with a profound concern over the entire handling of this case following the remand to the Commission. The impatience with the Public Intervenors, the hostility toward their efforts to satisfy a surprisingly strict standard of proof, plain errors in rulings and findings lead us, albeit reluctantly, to the conclusion that *it will serve no useful purpose to ask the Commission to reconsider the Examiner's actions and its own Decision and Order under a correct allocation of the burden of proof. The administrative conduct reflected in this record is beyond repair.*" 425 F.2d, at 550 (emphasis added).

Here, as in the above FCC case, there exist substantial and compelling reasons for not remanding this proceeding to the Commission. Here, as in that case, the "administrative conduct reflected in [the] record is beyond repair," and both courts found it would "serve no useful purpose" to remand (App. J 788).

In the above case the court noted the agency's "hostility" to certain parties. In the case at bar the court noted the Commission's "predilection to grant these particular applications" and an attitude that "sounds more in advocacy than in impartial adjudication" (App. J 787). Here,

the court also found that "a remand would only create further confusion and result in injustice" (App. N 817). This finding is compelled by many facts and circumstances, including the improperly injected political issues (App. J 769, 786); the voluminous evidence that is wholly unrelated to a determination of the issues presented by these applications;[53] and the court's recognition that the facts of record "have little bearing on a determination at this time of the present or future public convenience and necessity," (*id.*, at 787), there having been "a drastic change in circumstances since the record was closed in 1967" (App. N 815).[54]

The court repeatedly made it clear that the Commission is free to proceed further with a determination of the issues, but, under these peculiar circumstances, recognized that "a remand of this record would impede rather than facilitate the Commission's consideration of any further proceeding involving the present and future public convenience and necessity" (*id.*, at 814).

Appellees submit that remand to the Commission is not mandatory and, furthermore, that under the particular circumstances of this case the District Court properly declined to remand the case for further proceedings on the present record.

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53. See note 26, *supra*.

54. For example, evidence relating to service provided by three Atlanta-Dallas carriers in 1966-1967 would obviously shed no helpful light on a determination of the adequacy of service provided by 13 or more carriers now in operation. See note 3, *supra*.

CONCLUSION

There is no substantial question presented by these appeals. The assertions by the United States and the Commission that questions of "public importance" or of "major importance" are involved do not comport with the ruling by the eleven-member Commission that "no issue of general transportation importance is involved" (J.S. Red Ball B2). Case No. 73-1069 (Johnson) should be dismissed. The judgment of the District Court should be affirmed.

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